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MONTANA WATER COURT, LOWER MISSOURI DIVISION
ARROW CREEK - BASIN 41R

* *

CLAIMANT: United States of America (Bureau of Land Management)

OBJECTOR: State of Montana Attorney General

CASE 41R-200
41R 78847-00
41R 78851-00
41R 78853-00
41R 78854-00
41R 78867-00

ORDER GRANTING IN PART AND DENYING IN PART BLM MOTION TO AMEND, ORDER JOINING THE MONTANA ATTORNEY GENERAL AS A PARTY, AND ORDER SETTING TELEPHONE CONFERENCE

I. STATEMENT OF THE CASE

This case arises from a motion to amend water rights owned by the United States and administered by the Bureau of Land Management. The United States and the Bureau of Land Management are referenced as the BLM in this Order. There are five BLM rights in this case. None of the BLM's rights received objections from other parties.

Claims 41R 78853-00 and 41R 78854-00

Two of the BLM's rights are based on a well. Claim 41R 78853-00 is for stockwater and 41R 78854-00 is for wildlife.

The stock right is based on state law and has a priority date of December 31, 1879. The BLM seeks to amend the priority date of the stock right to match the wildlife claim. The BLM also seeks amendment of the stock right from a use right based on state law to a reserved right based on federal law.

The wildlife claim is based on a federal reservation, and has an October 12, 1963 priority date. The priority date for the wildlife claim coincided with completion of the well.

Claims 41R 78847-00, 41R 78851-00, and 41R 78867-00

Three other claims are also at issue in this proceeding. Each of these claims was filed as a reserved right for wildlife based on Public Water Reserve No. 107 ("PWR 107"), and each claim had a priority date of April 17, 1926. The BLM seeks to change these claims from reserved rights to use rights, and to change their priority dates to June 28, 1934, the date of enactment of the Taylor Grazing Act.

In addition to wildlife, the BLM asserts these rights should also be recognized for uses including riparian vegetation maintenance, water supply maintenance during drought, and evaporation and seepage losses from springs.

All of the claims in this case received a variety of issue remarks. These issue remarks must be resolved pursuant to § 85-2-248, MCA.

The purpose of this Order is to address the BLM's motion to amend and the issue remarks placed on each claim.

II. ISSUES FOR DECISION

The first set of issues pertains to stockwater claim 41R 78853-00 and wildlife claim 41R 78854-00. The overarching question for these claims is whether they should be recognized as federal reserved rights. Determining the answer to this question requires the following issues be addressed.

1. What was the primary purpose of PWR 107 and related legislation?
2. Was water necessary to effectuate the primary purpose of PWR 107 and related legislation?
3. What is the scope of a water right reserved under PWR 107?
4. Should the BLM claim for a reserved stockwater right be recognized pursuant to PWR 107?
5. Should the BLM claim for a reserved wildlife right be recognized pursuant to PWR 107?

The second set of issues pertains to claims 41R 78847-00, 41R 78851-00, and 41R 78867-00. The questions relating to these claims are as follows:

6. Did the BLM perfect use rights for wildlife under state law requiring intent, notice, and beneficial use?

7. Does the use of water for riparian vegetation maintenance, water supply maintenance during drought, and evaporation and seepage losses constitute a beneficial use of water under state law?

8. Is there sufficient information available to resolve issue remarks attached to claims 41R 78847-00, 41R 78851-00, and 41R 78867-00?

III. ANALYSIS

1. What was the primary purpose of PWR 107 and related legislation?

The BLM is claiming two federal reserved rights from an exploratory oil and gas well drilled by a private party. The well intercepted water, but not oil or gas. It was completed October 12, 1963 and released to the United States on November 16, 1963. Rieman Declaration, Exhibits 1 and 2.

The Department of the Interior filed a Notice of Completion of Groundwater by Means of Well, claiming water use for stock and irrigation purposes. Rieman Declaration, Exhibit 1. Claim 41R 78853-00 was claimed as a use right for stockwater with a December 31, 1879 priority date. Claim 41R 78854-00 was filed as a reserved right for wildlife with an October 12, 1963 priority date.

In its Motion to Amend, the BLM asserts that both rights should be considered federal reserved rights with priority dates of October 12, 1963, the date the well was completed. BLM Motion to Amend, p. 2. In support of this assertion, the BLM cites Department of the Interior Solicitor's Opinion M-36914. Rieman Declaration, p. 3.

Federal Reserved Water Rights

The doctrine of federal reserved water rights was set out in *Cappaert v. United States*, 426 U.S. 128, 138 (1976):

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in

> unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

The amount of water reserved by the United States depends on the purpose of the reservation.

> While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved... .

United States v. New Mexico, 438 U.S. 696, 700 (1978) (citations omitted).

A federal reserved right may only be recognized for the primary purposes of the reservation. Water rights for secondary purposes must be based on state law.

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

United States v. New Mexico, 438 U.S. 696, 702 (1978).

In summary, federal law specifies that reserved water rights may arise when a reservation is made through executive order or statute. A reserved water right was created if water was necessary to fulfill the primary purpose of the reservation. The amount of water reserved is limited to the amount minimally necessary to fulfill the primary purpose of the reservation and further depends on the availability of unappropriated water. The federal government may also obtain water rights for secondary purposes of a reservation, but those rights arise under state law.

The Montana Supreme Court has directed trial courts to apply the following test to claims for federal reserved water rights:

> For each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water - the minimal need as set forth in *Cappaert* and *New Mexico* -- required for such purposes.

State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 Mont. 76, 98, 712 P.2d 754, 767 (1985) (quoting *United States v. City and County of Denver* (Colo. 1983), 656 P.2d 1, 20).

Documents and Legislation Reserving Land from the Public Domain.

The documents and legislation relevant to potential reserved water rights based on converted oil and gas wells include Public Water Reserve No. 107, Section 10 of the Stock Raising Homestead Act, the Pickett Act, and the Oil and Gas Conversion Act.

PWR 107 was an Executive Order of Withdrawal signed by President Calvin Coolidge on April 17, 1926. It was issued pursuant to the Pickett Act and the Stock Raising Homestead Act.

The Pickett Act gave the President discretion to withdraw lands and reserve them for public purposes. The Pickett Act provided:

> [T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including the District of Alaska, and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

The Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847, 43 U.S.C. § 141 (repealed Oct. 21, 1976 by P.L. 94-579, Title VII, § 704(a), 90 Stat. 2792).

Section 10 of the Stock Raising Homestead Act ("SRHA") authorized the President to reserve lands containing waterholes or other bodies of water for public use for watering purposes. Section 10 of the SRHA provided:

> [L]ands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved under the provisions of [the Pickett] Act of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe.

Section 10, Stock Raising Homestead Act of 1916, 43 U.S.C. § 300 (repealed Oct. 21, 1976 by P.L. 94-579, Title VII, § 704(a), 90 Stat. 2792).

Together, the Pickett Act and the SRHA authorized the President to create public water reserves ("PWRs"). Hundreds of PWRs were created by Executive Order. Initially, PWRs were site specific and based on identification of particular springs or water holes.

PWR 107 was a departure from site specific PWRs. PWR 107 was a blanket withdrawal of public land. It provided in relevant part:

> [I]t is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby , withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec. 10 of the act of December 29, 1916 (39 Stat., 862), and in aid of pending legislation.

Exec. Order of Withdrawal, April 17, 1926 (Public Water Reserve No. 107).

President Coolidge issued Executive Order PWR 107 on the same day the Secretary of the Interior sent him the proposed order. The Secretary of the Interior explained the purpose of PWR 107 as follows:

> I transmit herewith a proposed order of withdrawal of 40-acre tracts containing and surrounding springs or water holes on the vacant unappropriated unreserved public lands.
>
> The control of water in the semiarid regions of the west means control of the surrounding grazing areas, possibly in some regions of millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain, it is believed important to retain the title to and supervision of such springs and water holes on the unreserved public lands as have not already been appropriated.

> Private parties have used various lieu selections and scrip note as a vehicle of acquiring small areas surrounding these springs and water holes, thus withdrawing them from the common use of the general public, this prime essential to grazing legislation mentioned, it is believed advisable to make a temporary general order of withdrawal.

Letter from Hubert Work, SOI, to Pres. (Apr. 17, 1926) (on file with Natl. Archives: DOI, CCF 1907-1936, File 2-153: Withdrawals under Act June 25, 1910, General, Public Water Reserves, Pt. 1, RG 48, NACP).

The Oil and Gas Conversion Act is also relevant to a discussion of federal water rights on BLM land, especially those based on wells drilled for oil and gas. The Oil and Gas Conversion Act provided in part:

> Water struck while drilling for oil and gas.
>
> Acquisition; condition in lease. All prospecting permits and leases for oil or gas made or issued under the provisions of this Act shall be subject to the condition that in case the permitee or lessee strikes water while drilling instead of oil or gas, the Secretary of the Interior may, when such water is of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, purchase the casing in the well at the reasonable value thereof to be fixed under rules and regulations to be prescribed by the Secretary. Provided, that the land on which such well is situated shall be reserved as a water hole under section 10 of the Act of December 29, 1916.

30 U.S.C. § 229a(a)(1934) (amended October 21, 1976 to remove the underlined language).

Department of Interior regulations stated that once an oil or gas well was found to be valuable and was acquired by the United States, "the land subdivision which contains the well will, if subject thereto, be held to be withdrawn by Executive Order of Apr. 17, 1926 (PWR 107) and reserved for public use pursuant to Section 10 of the Act of December 29, 1916 (SRHA)." 30 C.F.R. Part 241 (1939).

The purpose of PWR 107 and related legislation was to protect public access to grazing lands by preventing monopolization of water sources on those lands. Private appropriators controlled large tracts of public land by obtaining exclusive water rights in

areas where water was scarce. Once water sources were controlled by a single owner, other users could not use those sources for livestock, and were denied use of surrounding public lands. PWR 107 addressed this problem by reserving land and stock water for public use.

The primary purpose of PWR 107 was clear from its language, and the language of related documents and legislation. PWR 107 referred to springs and water holes as did the SRHA. The letter of transmittal from the Secretary of the Interior explained the purpose of the reservation and referred to the need to protect public lands by preventing monopolization of water sources.

Prior to its amendment in 1976, a purpose of the Oil and Gas Conversion Act also included protection of water for agricultural, domestic, or other purposes by reservation of the lands on which those water sources were located.

2. Was water necessary to effectuate the primary purpose of PWR 107 and related legislation?

Protection of water supplies to facilitate grazing was an essential purpose of reservations made under PWR 107 and the Oil and Gas Conversion Act. Without water, achieving the primary purpose of these reservations would have been impossible. Accordingly, PWR 107 and the Oil and Gas Conversion Act effectuated reservations of water rights necessary to protect public use of grazing lands.

Other courts considering this issue have reached similar conclusions.

The Idaho Supreme Court held that "PWR 107 evidences an express intention by Congress that reserves a water right in the United States." *United States v. Idaho*, 131 Idaho 468, 471, 959 P.2d 449, 452 (1998).

The Colorado Supreme Court held that the Executive Order did not expressly reserve water in public springs or waterholes but found that the Order and subsequent Department of Interior regulations enacted pursuant to the SRHA "reserved an amount of water minimally necessary to prevent the monopolization of vast land areas in the arid states by providing a source of drinking water for animal and human consumption." *United States v. City & County of Denver*, 656 P.2d 1, 31 (1982).

3. What is the scope of a water right reserved under PWR 107?

The scope of reserved water rights claimed pursuant to PWR 107 must be narrowly tailored to the purposes for which such rights were reserved. *New Mexico*, 438 U.S. at 700.

Other jurisdictions have found that PWR 107 water rights are limited to stock and domestic use. The Idaho Supreme Court held that "PWR 107 is a valid basis for a federal reserved water right for the limited purpose of stockwatering." *Idaho*, 959 P.2d at 453. The Colorado Supreme Court found "an intention to expand the water available to all members of the stockwatering and drinking public but not to reserve *all* spring water for *any* public purpose" *Denver*, 656 P.2d at 32 n.49. A Nevada State Engineers Opinion found the "precise federal purpose to be served under a PWR 107 claim is stockwatering and human consumption by grazing permittees...." *Applications 38638 et al.*, Ruling No. 5729, p. 12 (Office of the State Engineer of the State of Nevada, April 27, 2007).

Jurisdictions considering PWR 107 have also found that it did not reserve the entire yield of a waterhole or spring, but only the amount required to prevent monopolization of water for stock and domestic purposes. *Denver*, 656 P.2d at 32. ("The water court correctly ruled that the federal purposes could be satisfied with a quantifiable amount less than the entire yield of the springs and waterholes.")[1]

These limitations on the purpose and size of PWR 107 reserved rights are supported by the language of the reservation and related legislation.

PWR 107 refers to grazing, and by implication stockwatering. The Oil and Gas Conversion Act refers to use of water for "for agricultural, domestic, or other purposes." The SRHA refers to "water holes or other bodies of water needed or used by the public

[1] *See*, Solicitor's Opinion, M-36914 (Supp. II), 90 I.D. 81, 82-84, Feb. 16, 1983. Solicitor Coldiron's interpretation of PWR 107 aligns with the judicial interpretation in *City and County of Denver*, 656 P .2d 1 (1982). Solicitor Coldiron found that reservations were only applicable to "important" springs for the narrow purpose of human and animal consumption, which is consistent with the United States Supreme Court's holding in *United States* v. *New Mexico*, 438 U.S. 696 (1978). Solicitor Coldiron's Opinion modified Solicitor Krulitz's 1979 opinion, stating "the entire flow or quantity of water these reserved sources was accordingly not reserved unless necessary for the primary purposes -- a fact which must be determined on a case-by-case basis."

for watering purposes." This language is sufficient to establish that the water rights reserved by PWR 107 were for watering livestock.

4. Should the BLM claim for a reserved stockwater right be recognized pursuant to PWR 107 or the Oil and Gas Conversion Act?

Claim 41R 78853-00

Claim 41R 78853-00 is a stock claim with a flow rate of 2.00 gallons per minute. Although it fits within the scope of livestock rights reserved by PWR 107, the well upon which it is based did not exist when PWR 107 was issued. PWR 107 could not have reserved a water supply that did not exist.

The well was acquired pursuant to the Oil and Gas Conversion Act. The Oil and Gas Conversion Act referenced the SRHA at the time the well was acquired. The purpose of this reference was to assure that wells acquired by the United States pursuant to the Oil and Gas Conversion Act were considered reservations under the SRHA, and in turn PWR 107.

Accordingly, claim 41R 78853-00 can be recognized as a reserved stockwater right under the Oil and Gas Conversion Act and PWR 107. However, because the well did not exist at the time of PWR 107, its date of reservation, and therefore its priority date, must be the date the well was acquired by the United States. Accordingly, the priority date for claim 41R 78853-00 is November 16, 1963. Corrections to the abstract for 41R 78853-00 will be made when the issues regarding the remaining claims in this case are resolved.

5. Should the BLM claim for a reserved wildlife right be recognized pursuant to PWR 107 or the Oil and Gas Conversion Act?

Claim 41R 78854-00

Claim 41R 78854-00 is a wildlife claim with a flow rate of 2.00 gallons per minute. The BLM asserts it should be a reserved right. This claim received the following issue remark:

> THIS CLAIM WAS FILED AS A FEDERAL RESERVED RIGHT. IT IS NOT CLEAR IF THIS CLAIMED RIGHT IS A FEDERAL RESERVED

WATER RIGHT, BUT IF IT IS, IT IS NOT CLEAR WHETHER THE PURPOSE CLAIMED WAS CONTEMPLATED BY SUCH A RESERVATION, OR IF THE AMOUNT OF WATER CLAIMED IS THE AMOUNT NECESSARY TO FULFILL THE PURPOSE OF THE RESERVATION.

It also received the Bean Lake issue remark:

THE WATER COURT WILL HOLD A HEARING ON THIS CLAIM TO DETERMINE ITS VALIDITY SUBJECT TO SECTION 85-2-248 MCA, AND THE MATTER OF THE ADJUDICATION OF EXISTING RIGHTS IN BASIN 41I, 2002 MT 216...A HEARING MAY ALSO BE HELD ON THIS CLAIM IF A VALID OBJECTION IS FILED UNDER SECTION 85-2-233 MCA, OR THE WATER COURT CALLS THE CLAIM IN ON ITS OWN MOTION...

PWR 107, the Pickett Act, and the SRHA do not reference usage of water for wildlife.

This Court was unable to find any cases recognizing reservations of water for wildlife under PWR 107, the Pickett Act, or the SRHA.

It is unclear whether the Oil and Gas Conversion Act reserved water rights for wildlife.[2]

The Oil and Gas Conversion Act refers to use of water "for agricultural, domestic, or other purposes...." 30 U.S.C. § 229a(a) (2014). The Act does not refer to wildlife.

The BLM has not supplied evidence to suggest the term "other purposes" as used in the Oil and Gas Conversion Act implied that the Act was intended to protect wildlife.

The Colorado Supreme Court considered whether the Oil and Gas Conversion Act created a federal reservation of water in *Park Center Water District v. United States* 781 P.2d 90 (1989). The Court concluded the Oil and Gas Conversion Act created a federal reservation of water based on flows from oil and gas wells.

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[2] See *THE STATE OF THE LAW Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67, 68 (2001). ("Nor were any public water reserves set aside for wildlife purposes. In fact, when asked to cooperate in the improvement of springs on the public lands for wildlife purposes, the GLO contended it had no such authority and that any improvement had to be for stock watering purposes.")

Although the Colorado Supreme Court found that the purpose of the Oil and Gas Conversion Act was broader than protection of rangeland from monopolization, it did not recognize a federal reserved right for protection of wildlife.

Conclusion

The issue remarks attached to claim 41R 78854-00 raise questions regarding the perfection of a federal reserved water right for wildlife. The BLM has not supplied sufficient information to resolve these remarks.

6. Did the BLM perfect use rights for wildlife under state law?

The BLM's Motion to Amend its Water Rights

BLM's Motion to Amend states that claims 41R 78847-00, 41R 78851-00, and 41R 78867-00 should be changed from "reserved" rights to "use" rights. The Water Right Claim Examination Rules define a "Use Right" as an existing water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree." Rule 2(a)(71), W.R.C.E.R. Use rights require a showing of intent to appropriate a water right, notice to other water users usually in the form of a diversion, and historical beneficial use. *In the Matter of the Adjudication of the Existing Rights to the Use of Water in the Missouri River Drainage Area*, 2002 MT 216, ¶ 40, 311 Mont. 327, 55 P.3d 396; *Power v. Switzer*, 21 Mont. 523, 529-30, 55 P. 32, 35 (1898); *Toohey v. Campbell*, 24 Mont. 13, 17, 60 P. 396, 397 (1900); *Clausen v. Armington*, 123 Mont. 1, 7, 212 P.2d 440, 450 (1949).

In a statement attached to the BLM's Motion to Amend, BLM representative Frances Rieman asserts personal knowledge of the information utilized by the BLM in preparation of its water rights claims. The Declaration states that claims 41R 78847-00, 41R 78851-00, and 41R 78867-00 are for wildlife use located on public lands administered by the BLM. Ms. Rieman states that the BLM mistakenly filed these claims as federal reserved rights with a priority date of April 17, 1926 based on the Executive Order for Public Water Reserve No. 107 (PWR 107). Ms. Rieman states, "[t]he water right claims should have been based upon an appropriative right under Montana statutes, rather than upon a federal reserved water right as listed on the original statement of

claims." Rieman Declaration, 2. The Montana statutes relied on by the BLM are not identified.

The United States, like any other landowner, may appropriate water under state law. Such rights are not based on an executive order or a federal statute like a reserved right, but arise from state water law principles, which require actual use of unappropriated water by the United States. An opinion by the United States Solicitor characterized these rights as follows:

> Federal entities, including... the Bureau of Land Management, may not, without congressionally created reserved rights, circumvent state substantive or procedural laws in appropriating water. Rather, consistent with the express language in the New Mexico decision, federal entities must acquire water as would any other private claimant within the various states.

Department of the Interior, Solicitor's Opinion M-36914 (Supp. I), 88 I.D. 1055, 1064-65, September 11, 1981.

The BLM's claims for use rights are premised on the use of springs by wildlife. Ms. Rieman's Declaration asserts the priority date for these claims should be changed to June 28, 1934, when the Taylor Grazing Act was enacted. Rieman Declaration, 2. The BLM contends the Taylor Grazing Act "directs BLM to manage public lands for livestock and wildlife use." Motion to Amend, at 1, February 28, 2014.

The Taylor Grazing Act

Comprehensive management of grazing lands on the public domain began with the Taylor Grazing Act. The Taylor Grazing Act was passed "to establish grazing districts" on unreserved federal lands which the Secretary of the Interior deemed "chiefly valuable for grazing and raising forage crops" 43 U.S.C. § 315 (2014). The Act further provided that it should not be "construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State...." *Id.*

The Act made the following reference to wildlife:

§ 315h. Cooperation with associations, land officials, and agencies engaged in conservation or propagation of wildlife; local hearings on appeals; acceptance and use of contributions

The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wild life interested in the use of the grazing districts.

43 U.S.C. § 315h (2014).

The foregoing language authorizes the BLM to cooperate with groups interested in wildlife. It is not clear whether the BLM is relying upon the Act itself or other sources to support its assertion that the Act requires it to manage public lands for wildlife.

Prior Decisions of the Montana Water Court

Prior decisions of the Montana Water Court regarding BLM wildlife claims are in conflict.

The Water Court declined to recognize BLM claims for wildlife in a case arising in the Powder River Basin.[3] The Powder River case involved BLM claims for wildlife rights in stock ponds developed by private parties on the public domain. The Water Court concluded that the Taylor Grazing Act did not effectuate a reservation of public lands, and that incidental use of water by wildlife drinking from stock tanks did "not ripen into a water right vesting in the United States." Powder River Memorandum, at 2 and 8. The Water Court also rejected the BLM's claims in the Powder River case because the "United States did not take the water and divert it pursuant to the appropriation doctrine." Powder River Memorandum, at 9.

Notwithstanding the Powder River case, the Montana Water Court recognized BLM claims for wildlife in cases 42L-5 and 40P-2. Master's Report in Cases 42L-5 and 40P-2, March 5, 1985. These cases involved BLM wildlife claims which were initially denied by the Water Court and were not included in the preliminary decrees for the

[3] This case involved Water Right Declarations 3443-01, 6399-01, 6431, 6433-01, 6498-02, 6508-01, 7473-01, 7716-01, 7731-01, and 10248. A Master's Report and Memorandum of Law was issued March 7, 1983, and an Order adopting the Master's Report was issued March 31, 1983.

basins in which they were claimed. ("None of these claims were recognized because there was no appropriation of water.") *Id.* at 5.

The BLM objected to denial of its claims in cases 42L-5 and 40P-2. The question posed in the Master's Report was whether the BLM had "a Congressional mandate to manage the Public Domain for the benefit of wildlife that creates a water right in these particular claims?" *Id.* at 3.

The Water Court reversed its initial denial, and concluded the BLM's claims were valid because the management directives of the Taylor Grazing Act included "the conservation and propagation of wildlife...." *Id.* at 5. An Order adopting the Master's Report was signed by Chief Water Judge W.W. Lessley on March 5, 1985.

The Master's Report noted that 85-2-102(2), MCA recognized use of water for wildlife as beneficial.[4] The Master's Report referenced the presence of several species of animals near the sources in question, and observed that "[w]ildlife will, of course, drink wherever there is water." Master's Report, p. 4. The Master's Report does not mention whether the BLM intended to appropriate water for wildlife, whether notice was given to other water users of such intent, or whether action was taken by the BLM to facilitate the beneficial use of water by wildlife.

Although the analysis in cases 42L-5 and 40P-2 is not clear, those cases could be interpreted as creating water rights based on the Taylor Grazing Act and incidental usage of water by wildlife from available sources. The decision in 42L-5 and 40P-2 resulted in the recognition of claims that resemble federal reserved rights because their priority date was tied to specific legislation.[5]

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[4] The current version of this statute is 85-2-102(4), MCA. It states:

> "Beneficial use," unless otherwise provided, means:
>
> (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses... .

[5] In *Sierra Club v. Watt*, the District of Columbia Circuit considered whether passage of the Federal Land Management Policy Act constituted a withdrawal of lands from the public domain. FLMPA succeeded the Taylor Grazing Act, and was enacted to provide:

> [a] statement of purposes, goals, and authority for the use and management of about 448 million acres of federally-owned lands administered by the Secretary of the Interior through the Bureau of Land Management.

Wildlife Rights, Physical Diversions, and the Common Law Elements of an Appropriation

The need for a physical diversion of water as a prerequisite for all wildlife claims was rejected by the Montana Supreme Court in *In the Matter of the Adjudication of the Existing Rights to the Use of Water in the Missouri River Drainage Area*, 2002 MT 216, ¶ 20, 311 Mont. 327, 55 P.3d 396 (*Bean Lake III*).

In *Bean Lake III*, the Court described the traditional elements of an appropriation under the common law as "intent, notice, diversion and application to beneficial use." *Bean Lake III*, ¶ 10. The Court also noted that the doctrine of prior appropriation required flexibility, and held that wildlife claims could be recognized without a physical diversion when a diversion was not "a physical necessity for application to a beneficial use." *Bean Lake III*, ¶ 20. The Court further held that, although intent remained an essential element of a water right, intent "may be proven through means other than a diversion." *Bean Lake III*, ¶ 23.

Bean Lake III also referenced the need to communicate notice of intent to appropriate a water right to potentially impacted parties. "We hold that Montana recognized fish, wildlife and recreation uses as beneficial and that valid instream and inlake appropriations of water existed in Montana prior to 1973 where the intended beneficial use did not require diversion, and *when the facts and circumstances indicate that notice of the appropriator's intent had been given.*" *Bean Lake III*, ¶ 40 (emphasis added).

> These lands designated as ("public lands") constitute the largest system of Federal lands comprising 20 percent of America's land base and 60 percent of all federally-owned property. Over the years, the Congress has established statutory bases for the management of other, smaller Federal land systems: the National Forest, National Park, and National Wildlife Refuge Systems. No similar legislative foundation exists for the (public lands).

Sierra Club v. Watt, 659 F.2d 203, 205-206 (D.C. Cir. 1981) (citing S.Rep.No.583, 94th Cong., 1st Sess. 24 (1975), U.S. Code Cong. and Admin. News 1976, p. 6175).

The Court concluded that FLMPA did not withdraw land from the public domain and that no water rights were reserved as a consequence of the Act's passage. Although *Sierra Club v. Watt* did not mention the Taylor Grazing Act, the issue in that case was whether federal reserved rights existed on BLM lands.

Use Rights Versus Reserved Rights

Turning to the present case, the BLM has acknowledged that its initial decision to claim reserved rights was error. It now asks the Water Court to convert those reserved rights to use rights arising under state law.

Despite this request, the three wildlife rights requested by the BLM are not based on the three elements of a use right remaining after *Bean Lake III*. Absent from BLM's request for recognition of use rights is evidence that it: 1. intended to appropriate a water right; 2. provided notice of such intent to other appropriators; and, 3. actually applied water to beneficial use for wildlife.

The only reference to beneficial use is indirect, and apparently consists of the observation that wildlife are opportunistic, and will use water from any available source. The latter activity has occurred for millennia, and it is not clear whether the BLM is relying on naturally occurring usage of water by wildlife to demonstrate beneficial use, or whether it has taken additional action to facilitate such use.

The claim files for the BLM's wildlife rights in this case (claims 41R 78847-00, 41R 78851-00, and 41R 78867-00) include supporting documentation showing development of stockwater tanks. However, there is no information showing when the stock tanks were constructed or first used. In addition, the claim file for water right 41R 78851-00 contains information suggesting the stock tank for this claim is not in use, thereby raising an issue of abandonment.

The present record does not contain sufficient information to determine whether the BLM perfected use rights for wildlife under state law.

The approach taken by the BLM also raises an additional consideration. Despite claiming use rights, the BLM continues to cite the Taylor Grazing Act as the basis for its claims and requests a priority date equal to the date of the Act's passage. In this respect, the BLM is asserting claims with attributes of federal reserved rights. Federal reserved rights generally have priority dates based on the executive order or legislation giving rise to their creation. In effect, the BLM is asserting federal reserved rights but asking that they be labeled use rights arising under state law.

This leaves the questions raised in the issue remarks attached to these claims unresolved.

7. Does the use of water for riparian vegetation maintenance, water supply maintenance during drought, and evaporation and seepage losses constitute a beneficial use of water under state law?

The Declaration of Frances Rieman attached to the BLM's motion to amend states that claims 41R 78847-00, 41R 78851-00, and 41R 78867-00 are not only used for wildlife, but also for riparian vegetation maintenance, water supply maintenance during drought, and evaporation and seepage losses. Rieman Declaration, 1. The BLM's claim for water rights based on these purposes raises the following issues:

1. The nature of these claimed uses is not clear. As an example, what is meant by the terms "riparian vegetation maintenance," "water supply maintenance during drought," and "evaporation and seepage losses"?
2. Should such uses be considered beneficial uses under Montana law, and if so, how will these rights be administered if they are recognized?
3. If such uses are considered beneficial under Montana law, what information in the record supports perfection of a water right for these uses?

The presence of the foregoing issues raises questions about whether water rights were perfected for the three uses claimed in addition to wildlife.

8. Is there sufficient information available to resolve issue remarks attached to claims 41R 78847-00, 41R 78851-00, and 41R 78867-00?

Because claims 41R 78847-00, 41R 78851-00 and 41R 78867-00 were all initially filed as federal reserved rights for wildlife, they received the following issue remark:

> THIS CLAIM IS BASED ON PUBLIC WATER RESERVE NO. 107 CREATED BY EXECUTIVE ORDER DATED APRIL 17, 1926. IT IS NOT CLEAR IF THIS CLAIMED RIGHT IS A FEDERAL RESERVED WATER RIGHT, BUT IF IT IS, IT IS NOT CLEAR WHETHER THE PURPOSE CLAIMED WAS CONTEMPLATED BY SUCH A RESERVATION, OR IF THE AMOUNT OF WATER CLAIMED IS THE AMOUNT NECESSARY TO FULFILL THE PURPOSE OF THE RESERVATION.

Claims 41R 78847-00, 41R 78851-00, and 41R 78867-00 also received what is known as the Bean Lake issue remark:

> THE WATER COURT WILL HOLD A HEARING ON THIS CLAIM TO DETERMINE ITS VALIDITY SUBJECT TO SECTION 85-2-248 MCA, AND THE MATTER OF THE ADJUDICATION OF EXISTING RIGHTS IN BASIN 41I, 2002 MT 216...A HEARING MAY ALSO BE HELD ON THIS CLAIM IF A VALID OBJECTION IS FILED UNDER SECTION 85-2-233 MCA, OR THE WATER COURT CALLS THE CLAIM IN ON ITS OWN MOTION...

The process for resolution of issue remarks is found in 85-2-248 MCA. When an issue remark has not been resolved by an objection, the Water Court must "determine if information in the claim file or information obtained by the court provides a sufficient basis to resolve the identified issue remark." Section 85-2-248(3), MCA. The issue remarks referenced above have not been resolved by objection, and the information presently before the Court is not sufficient to resolve them otherwise. Among the issues raised but left unresolved are questions of nonperfection and abandonment.

Resolution of Issues Regarding Nonperfection or Abandonment

The process used to address unresolved issue remarks regarding nonperfection or abandonment is provided by Section 85-2-248(7)(a), MCA:

> If an unresolved issue remark involves nonperfection or abandonment, the water court shall join the state of Montana through the attorney general as a necessary party to resolve the issue remark. The water court shall notify the attorney general of the joinder.

There are multiple issues of nonperfection raised by the issue remarks placed on claims 41R 78847-00, 41R 78851-00, and 41R 78867-00. Although the BLM is now asserting these claims are use rights rather than reserved rights, it asks that each claim be based on the passage of federal legislation, rather than upon the common law elements of intent, notice, and beneficial use. This request raises questions about whether the BLM is asserting perfection of its rights under federal law pertaining to reserved rights or state law applicable to use rights, and whether there is sufficient evidence to conclude perfection occurred under either theory.

In addition, the *Bean Lake* remark raises questions about the validity, or perfection, of all three wildlife claims under state law.

The same issue remarks were also attached to claim 41R 78854-00. As noted under Part III.5 above, the issue remarks attached to claim 41R 78854-00 raise questions regarding the perfection of a reserved water right for wildlife.

Finally, the information in the claim file for 41R 78851-00 raises questions about whether it was abandoned through nonuse if it was perfected.

For these reasons, the Water Court is joining the Montana Attorney General as a party to this case in accordance with Section 85-2-248(7)(a), MCA. The purpose of joining the attorney general is to address the issues of nonperfection and abandonment described in Part IV below.

IV. ISSUES PRESENTED FOR REVIEW UNDER SECTION 85-2-248(7)(a), MCA

The Water Court requests that the attorney general and the BLM address the issues set forth below. The Water Court makes this request with the understanding that each party is free to make its own independent decisions regarding the issues to be addressed in this matter.

1. Is the analysis in cases 42L-5 and 40P-2 correct? If so, is the BLM entitled to water rights for wildlife with priority dates equal to the date of enactment of the Taylor Grazing Act?

2. Did the Powder River case correctly determine that incidental uses of water by wildlife did not create a water right?

3. Did the BLM have intent to appropriate the three use rights it is claiming for wildlife, and if so, how was that intent manifest? These claims are 41R 78847-00, 41R 78851-00, and 41R 78867-00.

4. If the intent to appropriate a water right existed, did the BLM provide notice of its intent to other parties?

5. Did the BLM apply water to beneficial use for wildlife?

6. Is there sufficient evidence to conclude that the three wildlife use rights now asserted by the BLM were perfected in accordance with Montana law?

7. If the three wildlife use rights were perfected, what is the priority date for each right?

8. Was claim 41R 78851-00 abandoned through nonuse?

9. Should claim 41R 78854-00 be recognized as a reserved right under federal law, and if so, what is the correct priority date for this right?

10. Are riparian vegetation maintenance, water supply maintenance during drought, and evaporation and seepage losses considered beneficial uses of water under Montana law?

11. Did the BLM perfect water rights for riparian vegetation maintenance, water supply maintenance during drought, and evaporation and seepage losses under state law? If so, what is the correct priority date for these uses?

V. ORDER

1. The State of Montana, through the attorney general, is joined as a party to this action. The Attorney General shall be added to the caption and service list as an objector.

2. The BLM's motion to convert stockwater claim 41R 78853-00 to a reserved right is GRANTED.

3. The BLM's motion to change the priority date for stockwater claim 41R 78853-00 to October 12, 1963 is DENIED. The correct priority date for this right should be the date the underlying well was acquired by the United States. That date is November 16, 1963.

4. Corrections to 41R 78853-00 will be made when the issues regarding the remaining claims are resolved.

5. A status and scheduling conference in this case will be held telephonically on **Friday, April 24, 2015 at 10:00 AM MDT**.

The instructions for accessing the call are as follows:

1. At the designated conference time dial the toll free telephone number: **1-877-526-1243**
2. At the prompt, enter the participant pin code followed by the pound (#) key: **7685196#**.

3. At the prompt state your name followed by the pound (#) key.

DATED this 9th day of March, 2015.

Russ McElyea
Chief Water Judge

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Note: Caption and Service List Updated 3/5/2015